

Indian Health Service
Rockville MD 20857

DEC 21 1994

TO: Acting Associate Director
Office of Tribal Self-Governance

FROM: Chief
Legal Liaison and Policy Review Branch

SUBJECT: Proposed Funding Procedure for IPA's to Tribes with Compacts

You requested DLR's views concerning the authority to allow IHS to adopt a new procedure regarding the funding of Federal personnel, supplies, etc. for tribes with Indian Health Service (IHS) compacts. Specifically, under the proposed procedure the entire amount of funds identified for the programs under the Annual Funding Agreement (AFA) would be obligated and made available to the tribe without any deduction and retention by the IHS for the cost of such assigned Federal personnel, supplies, etc. During the term of the AFA the tribe would make periodic payments to the IHS, possibly in advance, to reimburse the cost of salaries, supplies, and other services.

You recognized in your memorandum that in order for this procedure to be feasible payments received by the IHS would have to be credited to the account of the IHS and available for expenditure by the IHS.

You asked how to proceed with a legislative initiative if necessary to implement this proposed procedure.

Our research indicates that authority already exists to implement the proposal in part. We have already provided you with a copy of 5 USC 3373, titled Assignment of employees to State or local governments. Subsection (b) of 3373 states:

(b) The assignment of an employee of a Federal agency either on detail or on leave without pay to a State or local government under this subchapter may be made with or without reimbursement by the State or local government for the travel and transportation expenses to or from the place of assignment and for the pay, or supplemental pay, or a part thereof, of the employee during assignment. Any reimbursements shall be credited to the appropriation of the Federal agency used for paying the travel and transportation expenses or pay.

Section 3371, (2) defines "local government" to include any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village which is federally recognized and also includes any tribal organization as defined in section 4 of the Indian Self-Determination and Education Assistance Act.

Section 3373, therefore, authorizes the assignment of an employee of a Federal agency with reimbursement by the recognized tribe, band, or nation or any tribal organization meeting the above definition for the travel and transportation expenses to and from the place of assignment and for the pay or supplemental pay of the employee. However, only travel and pay have such authority. This proposed procedure is not authorized for supplies or other items that you mentioned in our discussions.

The reimbursements would be credited to the IHS appropriation.

In order to expand this authority beyond pay and travel you would need to proceed with a legislative initiative. Mike Mahsetky, the Chief of the Legislative Branch, can help you with developing a legislative initiative.

The statute provides discretionary authority so the IHS is not obligated to adopt this procedure but may choose to do so as a policy decision. However, there may be serious policy concerns with such an approach. As you know the Director of the Division of Resource Management, Jim Dunnick, was consulted regarding your question. He agrees with our analysis. However, he raised a number of technical administrative problems that could occur if the proposed procedure was implemented. You may wish to address his concerns directly with him before implementing the proposed policy. Other offices may have similar concerns.

If we can be of further assistance please let us know.

A handwritten signature in black ink, appearing to read "Richard G. Price", with a stylized flourish at the end.

Richard G. Price

**GOULD'S
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**Title 5 – Government Organization and Employees
Title 5 App. – Government Organization and Employees
Appendix
Title 28 App. – Judiciary and Judicial Procedure Appendix
Title 29 – Labor**

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SUBCHAPTER IV—TRANSFERS

§8351. Preference eligible; transfer; physical qualifications; waiver

In determining qualifications of a preference eligible for transfer to another position in the competitive service, an Executive agency, or the government of the District of Columbia, the Office of Personnel Management or other examining agency shall waive—

(1) requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and

(2) physical requirements if, in the opinion of the Office or other examining agency, after considering the recommendation of an accredited physician, the preference eligible is physically able to perform efficiently the duties of the position.

This section does not apply to an appointment required by Congress to be confirmed by, or made with the advice and consent of, the Senate.

§8352. Preference in transfers for employees making certain disclosures

(a) Subject to the provisions of subsections (d) and (e), in filling a position within any Executive agency, the head of such agency may give preference to any employee of such agency, or any other Executive agency, to transfer to a position of the same status and tenure as the position of such employee on the date of applying for a transfer under subsection (b) if—

(1) such employee is otherwise qualified for such position;

(2) such employee is eligible for appointment to such position; and

(3) the Merit Systems Protection Board makes a determination under the provisions of chapter 12 that a prohibited personnel action described under section 2302(b)(8) was taken against such employee.

(b) An employee who meets the conditions described under subsection (a)(1), (2), and (3) may voluntarily apply for a transfer to a position, as described in subsection (a), within the Executive agency employing such employee or any other Executive agency.

(c) If an employee applies for a transfer under the provisions of subsection (b) and the selecting official rejects such application, the selecting official shall provide the employee with a written notification of the reasons for the rejection within 30 days after receiving such application.

(d) An employee whose application for transfer is rejected under the provisions of subsection (c) may request the head of such agency to review the rejection. Such request for review shall be submitted to the head of the agency within 30 days after the employee receives notification under subsection (c). Within 30 days after receiving a request for review, the head of the agency shall complete the review and provide a written statement of findings to the employee and the Merit Systems Protection Board.

(e) The provisions of subsection (a) shall apply with regard to any employee—

(1) for no more than 1 transfer;

(2) for a transfer from or within the agency such employee is employed at the time of a determination by the Merit Systems Protection Board that a prohibited personnel action as described under section 2302(b)(8) was taken against such employee; and

(3) no later than 18 months after such a determination is made by the Merit Systems Protection Board.

(f) Notwithstanding the provisions of subsection (a), no preference may be given to any employee applying for a transfer under subsection (b), with respect to a preference eligible (as defined under section 2108(3)) applying for the same position.

(Added by P.L. 101-12, §5(a), Apr. 10, 1989, 103 Stat. 32, eff. July 9, 1989.)

SUBCHAPTER V—PROMOTION

§8361. Promotion; competitive service; examination

An individual may be promoted in the competitive service only if he has passed an examination or is specifically excepted from examination under section 2302 of this title. This section does not take from the President any authority conferred by section 8301 of this title that is consistent with the provisions of this title governing the competitive service.

§8362. Promotion; effect of incentive award

An agency, in qualifying and selecting an employee for promotion, shall give due weight to an incentive award under chapter 45 of this title. For the purpose of this section, "agency" and "employee" have the meanings given them by section 4501 of this title.

§8363. Preference eligible; promotion; physical qualifications; waiver

In determining qualifications of a preference eligible for promotion to another position in the competitive service, an Executive agency, or the government of the District of Columbia, the Office of Personnel Management or other examining agency shall waive—

(1) requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and

(2) physical requirements if, in the opinion of the Office or other examining agency, after considering the recommendation of an accredited physician, the preference eligible is physically able to perform efficiently the duties of the position.

This section does not apply to an appointment required by Congress to be confirmed by, or made with the advice and consent of, the Senate.

§8364. (Repealed)

SUBCHAPTER VI—ASSIGNMENTS TO AND FROM STATES

§8371. Definitions

For the purpose of this subchapter—

(1) "State" means—

(A) a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and a territory or possession of the United States; and

(B) an instrumentality or authority of a State or States as defined in subparagraph (A) of this paragraph (1) and a Federal-State authority or instrumentality;

(2) "local government" means—

(A) any political subdivision, instrumentality, or authority of a State or States as defined in subparagraph (A) of paragraph (1);

GOVERNMENT ORGANIZATION AND EMPLOYEES §3373

(B) any general or special purpose agency of such a political subdivision, instrumentality, or authority; and

(C) any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and includes any tribal organization as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 USC 450b);

(3) "Federal agency" means an Executive agency, military department, a court of the United States, the Administrative Office of the United States Courts, the Library of Congress, the Botanic Garden, the Government Printing Office, the Congressional Budget Office, the United States Postal Service, the Postal Rate Commission, the Office of the Architect of the Capitol, the Office of Technology Assessment, and such other similar agencies of the legislative and judicial branches as determined appropriate by the Office of Personnel Management; and

(4) "other organization" means—

(A) a national, regional, State-wide, area-wide, or metropolitan organization representing member State or local governments;

(B) an association of State or local public officials; or

(C) a nonprofit organization which has as one of its principal functions the offering of professional advisory, research, educational, or development services, or related services, to governments or universities concerned with public management.

(Amended by P.L. 100-472, title II, §203(b), Oct. 6, 1988, 102 Stat. 2290; P.L. 101-301, §2(c), May 24, 1990, 104 Stat. 207.)

§3372. General provisions

(a) On request from or with the concurrence of a State or local government, and with the consent of the employee concerned, the head of a Federal agency may arrange for the assignment of—

(1) an employee of his agency, other than a non-career appointee, limited term appointee, or limited emergency appointee (as such terms are defined in section 3132(a) of this title) in the Senior Executive Service and an employee in a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character, to a State or local government; and

(2) an employee of a State or local government to his agency, for work of mutual concern to his agency and the State or local government that he determines will be beneficial to both. The period of an assignment under this subchapter may not exceed two years. However, the head of a Federal agency may extend the period of assignment for not more than two additional years. In the case of assignments made to Indian tribes or tribal organizations as defined in section 3371(2)(C) of this subchapter, the head of an executive agency may extend the period of assignment for any period of time where it is determined that this will continue to benefit both the executive agency and the Indian tribe or tribal organization. If the assigned employee fails to complete the period of assignment and there is another employee willing and available to do so, the

Secretary may assign the employee to complete the period of assignment and may execute an agreement with the tribal organization with respect to the replacement employee. That agreement may provide for a different period of assignment as may be agreed to by the Secretary and the tribal organization.

"So in original. Probably should be 'title'."

(b) This subchapter is authority for and applies to the assignment of—

(1) an employee of a Federal agency to an institution of higher education;

(2) an employee of an institution of higher education to a Federal agency;

(3) an employee of a Federal agency to any other organization; and

(4) an employee of an other organization to a Federal agency.

(c)(1) An employee of a Federal agency may be assigned under this subchapter only if the employee agrees, as a condition of accepting an assignment under this subchapter, to serve in the civil service upon the completion of the assignment for a period equal to the length of the assignment.

(2) Each agreement required under paragraph (1) of this subsection shall provide that in the event the employee fails to carry out the agreement (except for good and sufficient reason, as determined by the head of the Federal agency from which assigned) the employee shall be liable to the United States for payment of all expenses (excluding salary) of the assignment. The amount shall be treated as a debt due the United States.

(d) Where the employee is assigned to a tribal organization, the employee shall be eligible for promotions, periodic step-increases, additional step-increases, merit pay, and cash awards, as defined in chapters 53 and 54 of this title, on the same basis as other Federal employees.

(Amended by P.L. 100-472, §203(f), Oct. 6, 1988, 102 Stat. 2290.)

§3373. Assignment of employees to State or local governments

(a) An employee of a Federal agency assigned to a State or local government under this subchapter is deemed, during the assignment, to be either—

(1) on detail to a regular work assignment in his agency; or

(2) on leave without pay from his position in the agency.

An employee assigned either on detail or on leave without pay remains an employee of his agency. The Federal Tort Claims Act and any other Federal tort liability statute apply to an employee so assigned. The supervision of the duties of an employee on detail may be governed by agreement between the Federal agency and the State or local government concerned.

(b) The assignment of an employee of a Federal agency either on detail or on leave without pay to a State or local government under this subchapter may be made with or without reimbursement by the State or local government for the travel and transportation expenses to or from the place of assignment and for the pay, or supplemental pay, or a part thereof, of the employee during assignment. Any reimbursements shall be credited to the appropriation of the Federal agency used for paying the travel and transportation expenses or pay.

(c) For any employee so assigned and on leave